U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

(b)(6)

U.S. Citizenship and Immigration Services

[redacted]

DATE: DEC 0 5 2013 OFFICE: TEXAS SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The AAO dismissed the petitioner's appeal from that decision. The matter is now before the AAO on a motion to reopen. The AAO will grant the motion and affirm the denial of the petition.

The petitioner filed the Form I-140 petition on May 25, 2012, seeking classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the sciences. The petitioner seeks employment as a geologist. The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States. The director denied the petition on November 6, 2012, stating that the petitioner qualifies for classification as a member of the professions holding an advanced degree, but that the petitioner has not established that an exemption from the requirement of a job offer would be in the national interest of the United States. The petitioner had established exceptional ability in the sciences, but did not establish eligibility for the waiver. The AAO dismissed the petitioner's appeal on April 29, 2013.

On motion, the petitioner submits a brief from counsel and several supporting exhibits.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or USCIS policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). The petitioner specifies that the latest filing is a motion to reopen, not a motion to reconsider, but counsel's brief contains numerous allegations of prior error by the AAO, making the latest filing, in effect, a motion to reconsider.

The USCIS regulation at 8 C.F.R. § 103.3(a)(2)(vii) permits the petitioner to supplement an appeal after filing it, but there is no parallel provision for motions to reopen. The motion must, therefore, be complete at the time of filing. The petitioner filed a timely motion on May 28, 2013.

Three months later, on August 26, 2013, the petitioner submitted four further witness letters dated between May 29, 2013 and August 22, 2013.) Two of the new letters are from the petitioner's former collaborators; the third is a follow-up letter from a professor who had submitted a letter previously; and the fourth letter is from the pastor of the petitioner's church (and also an official of the parochial school attended by the petitioner's granddaughter). The letters are not part of the motion; there is no provision for a petitioner to file a motion and then submit new evidence at a later date.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –

> (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
>
> (B) Waiver of Job Offer –
>
> > (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The director did not dispute that the petitioner qualifies as a member of the professions holding an advanced degree. The sole issue in contention is whether the petitioner has established that a waiver of the job offer requirement, and thus a labor certification, is in the national interest.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, P.L. 101-649, 104 Stat. 4978 (Nov. 29, 1990), published at 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991), states:

> The Service [now U.S. Citizenship and Immigration Services (USCIS)] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

In re New York State Dept of Transportation, 22 I&N Dec. 215, 217-18 (Act. Assoc. Comm'r 1998) (*NYSDOT*), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, a petitioner must establish that the alien seeks employment in an area of substantial intrinsic merit. *Id.* at 217. Next, a petitioner must establish that the proposed benefit will be national in scope. *Id.* Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available U.S. worker having the same minimum qualifications. *Id.* at 217-18.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. *Id.* at 219. The petitioner's assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The term "prospective" is included here to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative. *Id.*

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) defines "exceptional ability" as "a degree of expertise significantly above that ordinarily encountered" in a given area of endeavor. By statute, aliens of exceptional ability are generally subject to the job offer/labor certification requirement; they are not exempt by virtue of their exceptional ability. Therefore, whether a given alien seeks classification as an alien of exceptional ability, or as a member of the professions holding an advanced degree, that alien cannot qualify for a waiver just by demonstrating a degree of expertise significantly above that ordinarily encountered in his or her field of expertise.

On motion, counsel states that the petitioner's previous evidence "demonstrated that the beneficiary is an individual with exceptional academic credentials with a 50 year track record of accomplishments." Exceptional ability in the sciences is not grounds for the national interest waiver. Under section 203(b)(2)(A) of the Act, "immigrants . . . who because of their exceptional ability in the sciences . . . will substantially benefit prospectively the . . . United States" generally must show that their "services in the sciences . . . are sought by an employer in the United States." Under the plain wording of the statute, the petitioner must do more than show that he possesses exceptional ability in the sciences, and that his work will substantially benefit the United States.

Counsel states:

> Using an American standard of review it would be reasonable to include that a full professorship for a Doctor in 2 specific scientific endeavors Geology and Mineralogy are academic standards that represent one achieving the highest level of accomplishments in their particular field. In addition the Service has ignored and failed to acknowledge . . . his position of Head of Laboratory in the [redacted] and his coveted position of the Chief of the ([redacted] This accomplishment as documented should be sufficient evidence for the Service to reasonably conclude that the perspective [*sic*] benefit to the US "national interest" has been established by his exceptional ability, 3 post graduate degrees that connote a level of expertise significantly above that ordinarily encountered.

"[A] level of expertise significantly above that ordinarily encountered" is not grounds for approving the waiver. The petitioner has not established that "a full professorship" represents "the highest level of accomplishments in [his] particular field." The petitioner's previous positions of high rank in what was then the Soviet Union do not establish his continued standing in the field or show that the petitioner has continued to make significant contributions to that field. Counsel, on motion, cites

no precedent decision or other authority to indicate that the petitioner presumptively qualifies for the waiver on the basis of holding certain degrees or academic or professional titles.

Counsel disputes the use of the adverb "strongly" in a prior decision, stating: "This alleged requirement exceeds the scope of the Service's authority since the standard 'strongly' is not articulated by law, statute, or precedent decision." The purpose of the present motion is to contest the most recent decision, specifically the AAO's dismissal notice from April 2013. That notice did not include the word "strongly" except in quoting the director's November 2012 denial notice.

Dr. stated that the petitioner "is a well-suited candidate to serve as technical expert on complex problems in Geology." A more forceful assertion comes from Dr. a chemist at the who claims that the petitioner "is the absolute leader in the field of forecasting and gold prospecting."

Counsel takes exception to an introductory passage from the dismissal notice:

> The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

Counsel asserts that the petitioner did not rely solely on a "subjective assurance" of future benefit, and that it is a "disingenuous and a capricious insult to the beneficiary's record of achievements and accomplishments over the past 50 years" to state that he "has no demonstrable prior achievements." The quoted paragraph serves as introductory language; similar wording appears in *NYSDOT* at page 219. The dismissal notice contained no assertion that the petitioner relied solely on "subjective assurances" or had "no demonstrable prior achievements." That notice acknowledged numerous evidentiary submissions, and stated that the petitioner had satisfied the regulatory standard at 8 C.F.R. § 204.5(k)(3)(ii)(F), which concerns "[e]vidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations."

The dismissal notice indicated that the petitioner had listed 88 of his scholarly works, but "did not submit copies of the published works themselves, or evidence of their publication (such as indexes or database printouts). . . . Therefore, the list is not sufficient evidence of the published work or its impact."

On motion, counsel states that the AAO "incorrectly contends that the beneficiary has not submitted corroborative primary evidence. This arbitrary conclusion is not based on a realistic 'flexible' review and analysis of the documentation presented." Counsel does not specifically identify any previously submitted exhibit that would refute the assertion quoted above. Instead, counsel asserts that new exhibits C, D, E, and F establish that the petitioner's "theories presented in the 'published' documentation [are] in use today, in the Russian Federation."

Exhibit C is a photocopied document, "Methodology of forecasting and search mineral accumulations." A legend at the bottom of its translated cover page that reads ' ' The document itself, however, does not look like a finished publication. Rather, it appears to be a typed manuscript. It shows numerous handwritten annotations and occasional corrections and overtyped letters.

The cover page identified two authors, the petitioner and Exhibit D is an affidavit from the petitioner's spouse, which reads:

> I co-authored with [the petitioner], as published in 1988 are currently in use in the Russian Federation formerly the USSR.
>
> In almost every field of science to include dentistry, natural sciences, geology, chemistry, physics, metallurgy and medicine, the application of our research is acknowledged.
>
> As a result of the research conducted by [the petitioner] and myself, it was determined by the medical profession in Russia that the innovative theories could be used to treat specific "rare" diseases. The technology advance by [the petitioner] and myself is currently being used in Russia to treat "Sjogren's Syndrome" as affirmed by Dr.
>
> Significantly, a letter by Dr. confirms the present day application of our findings.

The letter quoted above claims a 1988 publication date for ' ' whereas the submitted manuscript shows the date "2008." Neither the manuscript nor letter is first-hand evidence of publication. The petitioner's previously submitted chronological list of claimed publications did not show any publications appearing in 1988 or 2008. The newly claimed title is not on the list.

Exhibit E is the aforementioned letter from Professor The witness states that, while researching the autoimmune disorder Sjogren's syndrome, she "came across a computer forecasting system and the search for mineralization" developed by the petitioner and his spouse. Prof. states: "With the help of [the] computer programs we've got very interesting results. . . . [A] [s]ystem created [to] find patterns in geology, was able to answer some questions of medicine."

Exhibit F on motion is from the petitioner's daughter, identified as "a lecturer at [several] " who stated: "In my lectures I used [the petitioner's] works, because he developed a system of methods applicable to almost any field of endeavor, such vast amounts of information it can process."

Exhibit F also includes a printout from a promotional web site for The page does not mention the petitioner or Prof. and the petitioner has not otherwise explained its direct relevance to the motion.

The above exhibits are not objective, independent evidence of published material by the petitioner. Exhibit C is a manuscript in an unfinished, unpublished state; exhibits D and F are statements from the petitioner's own wife and daughter; and exhibit E does not mention any published work at all, referring instead to a "computer forecasting system." The petitioner did submit evidence of the publication of but he does not claim to have written that book. The information about the book does not indicate that geology or mineralogy had produced improvements in diagnosing or treating the disease. The petitioner's previous submissions said nothing about Sjogren's syndrome or any possible medical applications of his work as a geologist.

Counsel states that the petitioner had submitted a "documented list of published scientific works," and maintains that the petitioner "has published 88 scientific works." Counsel cites exhibit G, which is a copy of the previously submitted list of claimed publications. A list of claimed publications is not sufficient to establish the existence of those publications. Counsel maintains that the petitioner's list of claimed publications "is supported by the specifics enumerated in his documentation that can be verified by the Service" including "an affidavit by [the petitioner]."

> The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

8 C.F.R. § 103.2(b)(2)(i). In this instance, the primary evidence would be copies of the published materials themselves. The petitioner has not submitted these materials or demonstrated that they are not available. Secondary evidence could take the form of documentation from the publisher(s), indexes or bibliographies that identify the petitioner's published work, or catalogs listing the publications. The petitioner has not submitted this evidence either. Witness letters attesting, in general terms, to the influential nature of the petitioner's published work cannot overcome the petitioner's failure to submit primary evidence regarding his claimed published work.

In a new affidavit, the petitioner states that all 88 items on the previously submitted list "were 'published.' . . . My publications can be verified by the index provided and by the corroborative

attestations by independent experts that are familiar with my research and publications." The list and witness letters are not first-hand evidence of publication. The petitioner, on motion, submits photocopies of five book covers and a partially translated photocopy of ' a comb-bound volume bearing the date 2002 and the name of a power engineering company in Russia. These materials help to establish the existence of some of the claimed publications, but not all of them. The petitioner did not explain why comparable evidence is not available for the majority of his claimed published works.

The petitioner's assertion that all of the items on the 88-item list "were published" contradicts the list itself, which refers to several items (including the 2002 document) as "manuscripts."

Many translated materials submitted on motion include translator certifications as required by the regulation at 8 C.F.R. § 103.2(b)(3). Lacking this certification is a translated letter from Dr. which Dr. identified as "the leading research institute in Russia." Dr. translated letter reads, in part:

> cooperates with [the petitioner] on a wide range of scientific problems of geological [*sic*] more than 20 years. In 1990, on his initiative and under his leadership started work on the manufacturing application of mathematical modeling of the gold, to create data banks and the prediction system of ore and placer gold deposits.
>
> Computer methods of modeling and data processing at the institute eventually improved in accordance with the new computer technologies, but they are based on ideas proposed [by the petitioner]. The forecasting system has become firmly established in the fields of work and its effectiveness is proven by time. . . .
>
> The system of forecasting and exploratory research . . . created by [the petitioner] and I. Tyutyavina significantly improves the efficiency of detection of gold objects. . . .
>
> Since 2006, [the petitioner] led himself and was directly involved in the re-evaluation of gold-bearing areas in the drafting forecast maps in areas of the Irkutsk region. He marked a number of promising new areas. In 2007-2009 [the petitioner] together with geologists of the Geological Department of the Irkutsk performed exploration work within several selected (by the technique) promising areas. Two of them were placed for exploration.

Dr. director of the at the Russian Academy of Sciences, states that some of the petitioner's research concerned volcanoes, but "the main focus" was "the study of gold content on the shelves of the Northern and far Eastern seas."

The dismissal notice indicated that the petitioner initially based the petition on an intention to seek phosphate deposits in Florida, and later claimed an intention to look for gold and hydrocarbons

elsewhere in the United States. This change of emphasis does not establish that the petition was approvable at the time of its filing.

Counsel, on motion, states that the AAO is being "inflexible" and "completely missed the point of the submission of the 'Gold Rush' article." Counsel then states:

> If [the petitioner] is an accomplished individual of exceptional ability as acknowledged by the Service and if he is dealing in an area of intrinsic merit as previously acknowledged by the Service, then one must conclude that [the petitioner] can prospectively benefit the national interest as a whole by implementing his theories for gold extraction well into the future.

Under section 203(b)(2)(A) of the Act, every alien of exceptional ability is presumed to offer prospective benefit to the United States. That prospective national benefit, however, is not sufficient to exempt those individuals from the job offer requirement that appears in the same statutory clause. Exceptional ability is not presumptive or automatic grounds for the national interest waiver.

Elsewhere on motion, counsel states: "The Service incorrectly and capriciously abused its discretion by stating that the 'intrinsic merit' guideline relates to the petitioner's occupation rather than that the petitioner's individually [*sic*], and is only one of several criteria that the petitioner must satisfy in order to qualify for a waiver." Counsel offers no support for this reading of the "intrinsic merit" guideline, and a review of the *NYSDOT* decision refutes it. The relevant portion of that decision reads: "Several factors must be considered when evaluating a request for a national interest waiver. First, it must be shown that the alien seeks employment in an area of substantial intrinsic merit. This beneficiary's field of endeavor, engineering of bridges, clearly satisfies this first threshold." *Id.* at 217. Thus, "intrinsic merit" is indeed one of "[s]everal factors." In discussing the beneficiary in *NYSDOT*, it was the "beneficiary's field of endeavor," not the beneficiary individually, who "clearly satisfies this . . . threshold."

Counsel states that the dismissal notice "erroneously and incorrectly raised the specious issue that the record does not show any employer in the hydrocarbon industry has expressed an interest in employing the petitioner in that capacity. This is an abuse of discretion since the Service raised an issue that is totally irrelevant to the issue presented." The petitioner filing a petition originally based specifically on phosphate prospecting, and later, in response to the July 2012 request for evidence, submitted evidence regarding hydrocarbons. To note this significant shift in emphasis after the initial filing is not "totally irrelevant to the issue presented."

Returning to the offer to prospect for phosphate at a site owned by in Florida, counsel states that the petitioner, "upon[] the conclusion of his survey is qualified to make a professional recommendation as to the mining and extracting process with a minimum impact on the environment. . . . [The petitioner's] erudite understanding of pollution control and its environmental impact was the primary reason for his selection by to survey the aforementioned property." There has been no finding that the petitioner lacks the competence or

qualifications to survey the site; USCIS acknowledged his exceptional ability as a geologist. Exceptional ability, however, is not sufficient to establish eligibility for the waiver.

The dismissal notice contained the following passage: "[paralegal [redacted] did not explain how this feasibility study would benefit the United States economy. Ms. [redacted] earlier predictions of future economic benefit from phosphate recovery rely on the still unproven presumption that those deposits exist." On motion, counsel states: "North Florida has one of the largest deposits of phosphate in the US. For the Service to suggest that the survey of 1800 acres in [redacted] FL is an unproven presumption is a contradiction of published scientific fact." Counsel asserts that the conclusions in the dismissal notice amount to an "'inflexible' analysis" of the record. The petitioner submits materials on motion showing the existence of significant phosphate deposits in northern Florida. The dismissal notice did not deny the existence of phosphate deposits in northern Florida. Rather, it referred to the presence of such deposits on [redacted] lot as "unproven." The job offer letter from [redacted] resubmitted on motion, specifically asked the petitioner to "determine if there are sufficient phosphate reserves to justify the implementation of a recovery facility."

The petitioner did not claim any work experience in the three years preceding the filing of the petition, instead describing himself as "retired," and his list of claimed articles included only one entry after 1989, specifically a manuscript from 2002. On motion, counsel states:

> Age discrimination is not tolerated under federal and state law. . . .
>
> In addition, the mere fact that [the petitioner] has been "retired" for the past 3 years does not preclude his ability to continue with his research and to consult with US companies in his areas of expertise.
>
> . . . For the Service to raise an issue about [the petitioner's] age or retirement is unjustified, unreasonable, and beyond the scope of its authority.

The petitioner's age or retirement do not suggest his lack of ability to contribute in the future. It remains, however, that the petitioner did not establish any ongoing activity at the time he filed the petition. The assertion that the petitioner remains able "to consult with US companies" demonstrates his desire for employment, but not the desire of those companies to employ him. A single offer of short-term contracting work seeking phosphate deposits for [redacted] does not establish that the petitioner has significant, realistic prospects to find gold and extract petroleum from shale in the United States.

The petitioner's list of claimed articles stops at 2002. [redacted] letter indicates that the petitioner "was engaged in the analysis of field data. . . . Unfortunately, these studies were interrupted. But we very much look forward to the new monograph, which [the petitioner] plans to complete in 2014." The record does not reveal what interrupted the petitioner's previously unmentioned ongoing studies. As noted before, the petitioner himself attributed his recent inactivity to retirement.

Comparing the petitioner's work to Albert Einstein's 1915 publication of the theory of general relativity, counsel asserts that the petitioner's work remains in use today. The record does not establish that the petitioner's work from decades ago remains in use despite advances in his field, or that geologists in the United States have used, or plan to use, the petitioner's work.

Counsel states:

> Counsel suggests that the adjudicator in this matter consult with a qualified PHD with a degree in Geology and Mineralogy in order to determine the viability and significance of [the petitioner's] findings. . . .
>
> The beneficiary . . . has specifically requested a certified copy of the adjudicator's credentials as it relates to his or her qualifications to evaluate a published manuscript dealing with a specific process for extracting oil and gas from shale. Beneficiary respectfully submits that the adjudicator is not qualified to evaluate the scientific significance and the potential benefit to the US economy as a whole without an advanced degree in Geology and Mineralogy.

In visa petition proceedings, it is the petitioner's burden to establish eligibility for the immigration benefit sought. Section 291 of the Act, 8 U.S.C. § 1361; *Matter of Otiende*, 26 I&N Dec. 127, 128 (BIA 2013). When the petitioner first filed the petition, he did not indicate that he would serve the national interest by "extracting oil and gas from shale." The basis for the initial waiver request was "his offer of employment . . . to conduct a feasibility study on an 1,800 acre track [*sic*] of land in ," which "will result in significant job creation in FL." Neither the petition, response to the request for evidence, appeal, or motion demonstrate that the petroleum and gas industry in the United States has taken notice of the petitioner's work or expressed an intention of using either his personal services or the methods described in his manuscript.

The new evidence submitted on motion does not establish eligibility for the national interest waiver. Counsel's assertions do not show that the prior dismissal notice was based on an incorrect application of law or USCIS policy, or that the decision was incorrect based on the evidence of record at the time of the initial decision. Here, the petitioner has not met that burden. The AAO will, therefore, affirm the denial of the petition.

ORDER: The denial of the petition is affirmed.